1993

Bailey-Allen Company, Inc. v. Stanley M. Kurzet, an individual; Stanley M. Kurzet and Anne L. Kurzet, as Trustees for The Kurzet Family Trust; The Kurtzet Family Trust; and John Does 1 through 10 : Reply Brief

Utah Court of Appeals

Bruce J. Nelson; Allen, Nelson, Rasumussen and Christensen; Attorneys for Plaintiff and Appellee.
Spencer E. Austin; William J. Evans; Parsons, Behle and Latimer; Attorneys for Defendants and Appellants.

IN THE UTAH COURT OF APPEALS

* * * * * * * *

BAILEY-ALLEN COMPANY, INC., Plaintiff and Appellee, vs. STANLEY M. KURZET, an individual; STANLEY M. KURZET and ANNE L. KURZET, as Trustees for THE KURZET FAMILY TRUST; THE KURZET FAMILY TRUST; and John Does 1 through 10, Defendants and Appellants.	REPLY BRIEF OF APPELLANTS Case No. 930178-CA Priority 15

* * * * * * * *

APPEAL FROM THIRD JUDICIAL DISTRICT COURT OF SUMMIT COUNTY, STATE OF UTAH, HONORABLE HOMER WILKINSON, DISTRICT JUDGE

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BAILEY-ALLEN COMPANY, INC., Plaintiff and Appellee, vs. STANLEY M. KURZET, an individual; STANLEY M. KURZET and ANNE L. KURZET, as Trustees for THE KURZET FAMILY TRUST; THE KURZET FAMILY TRUST; and John Does 1 through 10, Defendants and Appellants.	REPLY BRIEF OF APPELLANTS Case No. 930178-CA Priority 15

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III. DETERMINATIVE CONSTITUTIONAL PROVISIONS AND STATUTES

Utah Rule of Civil Procedure 54(e) (1992);

Utah Rule of Appellant Procedure 32 (1992);

Utah Code Annotated § 38-1-18 (1992);

Utah Code Annotated § 14-2-1 (1992);

Utah Code Annotated § 14-2-2 (1992).

The foregoing provisions are set forth in full in the addendum hereto.

IV. ARGUMENT

A. INTRODUCTION

Appellee Bailey-Allen Company, Inc. ("Appellee") was not entitled to damages in this case. A valid, enforceable contract existed between Appellant and Appellee and, because Appellee breached the contract, it was improper to award Appellee damages under the contract. Moreover, because the relationship of the parties was governed by contract, and because the court specifically found that Appellee did not fulfill its obligations under the contract to direct and supervise the construction, it was improper to grant relief under a theory of unjust enrichment for Appellee's services in directing and supervising the construction.

The Court also erred in failing to award Appellants their attorney fees incurred in successfully bringing a Motion for Partial Summary Judgment on Appellee's causes of action based on the Mechanic's Lien Statute and on the Construction Bond Statute.

Both statutes provide for an award of attorney fees to the prevailing party. Finally, the trial court erred in awarding prejudgment and post-judgment interest. Prejudgment interest was not available because the amount of damages was unliquidated until judgment was entered. Post-judgment interest, if any, should have run from the date judgment was entered, not from the date the trial court granted Appellee's Motion to Compel Filing of Findings, Conclusions and Judgment.

B. APPELLEE WAS NOT ENTITLED TO DAMAGES EITHER ON THE CONTRACT OR UNDER A THEORY OF UNJUST ENRICHMENT.

1. Appellee Was Not Entitled to Damages Under the Contract.

As discussed in the Brief of Appellant, Appellee was not entitled to damages under the contract because the trial court found that Appellee did not obtain evidence of insurance and did not perform his contractual obligation to direct and supervise the construction. (R. 217.)

Is its Brief, Appellee has argued that it should have been paid for "pre-breach," or "previously-earned" contractor fees in the case of default during construction. (Brief of Appellee at 13.) In fact, Appellee's failure to obtain insurance put Appellee in breach of the contract from the moment the contract was signed. There was no period of time, therefore, that was "pre-breach." Nevertheless, Appellee contends that the construction contract did not prohibit payment for pre-breach services, that the parties did

not intend such a result, that the contract should be construed against Appellants who drafted the agreement, and that the trial court was free to interpret the contract as allowing an award of "previously earned" contractor fees.

Assuming for the sake of argument that Appellee is correct on all these points, Appellee is still not entitled to damages under the contract because the trial court found that Appellee failed to adequately perform the services upon which compensation was contingent. In other words, regardless of how the damages provision is interpreted, Appellee is not entitled to enforce the contract because it was the breaching party. See, Nielsen v. Wang, 613 P.2d 512, 514 (Utah 1980) ("The rule in Utah is that to recover on a contract, a contractor must first establish his own performance [or] a valid excuse for his failure to perform."); Liddle v. Petty, 816 P.2d 1066, 1068 (Mont. 1991) (If one contracting party materially breaches the contract, the other is entitled to suspend his performance).

Appellee was terminated because it failed to properly discharge its duties as general contractor to direct and supervise the construction. (R. 217.) Throughout its Brief, Appellee has admitted its breach for failure to obtain insurance, but it has utterly ignored the trial court's determination that Appellee breached its obligation to direct and supervise the construction. The trial court found Appellee had not only failed to obtain

insurance, but it failed to properly perform its services as general contractor, failed to spend sufficient time on the job, failed to take care of matters promptly as they arose, failed to move the work forward, failed to respond to questions concerning the construction and failed to give the project the kind of attention Appellee knew it required under the contract. (R. 801; R. 217.) The trial court concluded that these deficiencies constituted a material breach of the contract and that "the defendant was justified in terminating the relationship, terminating the contract." (R. 801.) The court also found that Appellants were not in breach of the contract in any way.

Appellee failed to establish, and the trial court did not conclude that Appellee had "earned" any amount whatsoever from performing pre-breach services under the contract. In its Brief, Appellee has cited several entries in Appellants' log book that Appellee suggests are indications that Appellee provided some compensable service. Mr. Kurzet recorded that "there was good progress on framing," and that he felt that "things were going okay." (R. 608-09.) Appellee is eager to step forward and claim credit for the progress that was made during the period of time he was general contractor. But, as discussed in Appellants' Brief, the progress on construction that was made during the period that Appellee was on the job was not due to Appellee's effort. (See Brief of Appellant at 26-29).

The record shows that the construction that was completed during those few months was due to the efforts of a carpenter and contractor whom Mr. Kurzet had hired before Appellee was hired as general contractor. (R. 559.) Appellee's initial involvement in the project was contingent upon its accepting Appellants' carpenter. (R. 559-600.) Appellee failed to regularly appear at the job site for more than about one half hour a day (R. 695), did not attend meetings with the architect to discuss problems that had arisen (R. 700), and generally failed to give the job adequate attention. (R. 217.)

Contrary to Appellee's suggestion, the trial court did not find that Appellee had earned any contractor fees. Based on the evidence of record, the trial court found that Appellee did not perform under the contract. Neither party has challenged that finding. Appellee's argument that it is entitled to compensation for the pre-breach services simply is not supported in the record.

Having breached the provision of the contract on which payment for directing and supervising the construction was contingent, Appellee was not entitled to enforce it against Appellants. Appellee's arguments about the measure of damages to which Appellee might have been entitled are entirely irrelevant. Appellee did not perform the required services under the contract and, therefore, there were no grounds on which Appellee could have

been entitled to compensation for pre-termination services under the contract.

2. Appellee Was Not Entitled to Recover Under a Theory of Unjust Enrichment.

Recovery under a theory of unjust enrichment "presupposes that no enforceable written or oral contract exists." Davies v. Olsen, 746 P.2d 264, 268 (Utah Ct. App. 1987). Under Utah law, an award for unjust enrichment is usually not available when an enforceable contract exists. See, Karapanos v. Boardwalk Fries, Inc., 837 P.2d 576, 578 (Utah Ct. App. 1992). When an express construction contract exists, quantum meruit may be proper, if at all, only when a contractor is required to perform work outside the scope of the contract, or when a contractor justifiably ceases work or is unjustifiably terminated. Highland Const. Co. v. Union Pacific Railroad Co., 683 P.2d 1042, 1048 (Utah 1984) (dictum); Davies, 683 P.2d at 1048 (dictum). Appellee has cited no Utah law to support the notion that the remedy of unjust enrichment is available under the facts of this case. A valid contract existed between Appellants and Appellee and there are no circumstances that would invoke an exception to the rule and justify an award of unjust enrichment.

Assuming, arguendo, that the theory of unjust enrichment were applicable here, it still would have been error here to award

Appellee anything in unjust enrichment because the legal grounds for such an award were absent. To recover for unjust enrichment, a plaintiff must demonstrate that the defendant received a benefit, had some appreciation or knowledge of the benefit, and received it under circumstances that would make it unjust to retain it without paying for it. Davies v. Olsen, 746 P.2d at 269.

Appellants have consistently and vigorously denied that they received any benefit from Appellee's services and the trial court did not find otherwise. The award of $10,000.00 in quantum meruit was based solely on the calculation that 10% of the construction was completed while Appellee was general contractor. The court concluded that because 10% of the construction had been completed, Appellants received a benefit "regardless of whether Appellee performed its duties under the contract." (R. 216.)

There was no determination that Appellee's efforts had caused or contributed to the 10% partial completion. Although 10% of the construction was accomplished while Appellee was general contractor, the trial court found that Appellee failed to perform the required services. (R. 217.) The court concluded: "Even if [Appellee was] not there ... there had been 10% work accomplished, and therefore the defendant had been enriched by that amount." (R. 803 (emphasis added)). The essential element in the theory of unjust enrichment, i.e., that it was the plaintiff that conferred the benefit on defendant, is absent in this case. The court did

not and could not base the award on the value of the benefit that Appellee actually conferred on Appellant.

Appellee has contended that it is entitled to $5,500.00 under an unjust enrichment theory for negotiating the purchase of lumber. Appellee argues that those services were not part of obtaining "competitive bids" as stated in the contract because the lumber, although not paid for, had already been delivered to the site. Appellee counted up the lumber, decided that the price was too high, and recommended that Appellants pay $5,500.00 less than the asking price. Appellee did not obtain the initial bid on the lumber because Appellee had not yet been hired as general contractor. There is very little difference, however, between obtaining a reasonable price based on competitive bids and obtaining a reasonable price from one supplier. The trial court did not find that such duties fell outside the scope of the contract. See Highland Const. Co. v. Union Pacific Railroad Co., 683 P.2d at 1048 (dictum that unjust enrichment doctrine might apply when work is outside the scope of contract). Assuming Appellee saved Appellant $5,500.00, the service was one of Appellee's contractual duties. Appellee is not entitled to keep for himself the amount saved.

Appellee has contended that fairness does not require "previously earned" compensation to be forfeited upon a breach of contract by Appellee. To illustrate, Appellee has offered a

hypothetical situation in which a contractor completed 99% of the work on a project and then was terminated for failure to provide current liability insurance. The final 1% was completed by a second contractor. Appellee submits that unfairness would result if the first contractor were to receive nothing for having completed 99% of the construction.

Appellee's hypothetical example bears almost no resemblance to the present case. In this case, the work was only 10% completed, there was no evidence that Appellee contributed to that portion of completion, and Appellee was not terminated merely for failure to provide evidence of insurance. If Appellee's hypothetical situation were to conform to the facts of this case, it would read very differently: An owner hires a carpenter to build his home and then hires a general contractor to oversee the construction. The general contractor fails to appear at the job site and does virtually nothing to advance the work. The carpenter takes on responsibility for the construction and completes 99% of the construction. Finally, the owner terminates the general contractor, promotes the carpenter to general contractor, and proposes to pay the carpenter the contractor's fee. In this case, it would be tremendously unfair <u>not</u> to withhold payment from the contractor and pay the carpenter instead.

Appellee's hypothetical fails because it refuses to acknowledge that Appellee was terminated not merely because it

failed to provide evidence of adequate insurance, but because it did not perform its duties as general contractor. Appellee's "pre-termination services" were simply not adequately rendered and the trial court was correct in finding that Appellee breached the contract in that respect. Under the circumstances, fairness does not require that Appellee receive $10,000.00. Indeed, it would be unfair to those who eventually completed the job and to Appellants to require Appellants to pay for services inadequately performed or never undertaken.

Appellee has attempted to divert attention from its non-performance by discussing only what the proper remedy should be and by pretending that Appellee's only breach of the contract was its failure to provide evidence of adequate insurance. The law in Utah clearly holds that when a valid contract exists, a claim for unjust enrichment is improper. Karapanos v. Boardwalk Fries, Inc., 837 P.2d at 578. In order for a contractor to recover on a construction contract, it must first establish its performance under the contract. Nielsen v. Wang, 613 P.2d 512, 514 (Utah 1980). The relation of the parties was governed by the contract and, even though certain terms of the contract were ambiguous, the trial court did not have the latitude to reform the parties' obligations in favor of a theory of unjust enrichment. The trial court's award of damages was error and should be vacated.

C. **THE TRIAL COURT ERRED IN FAILING TO AWARD APPELLANTS THEIR ATTORNEY FEES UPON DISMISSAL OF APPELLEE'S CLAIMS UNDER THE MECHANICS' LIEN STATUTE AND THE BOND STATUTE.**

An award of attorney fees under the Mechanics' Lien Statute is mandatory. The statute provides that "the successful party shall be entitled to recover a reasonable attorney fee." Utah Code Ann. § 38-1-18 (1992). Appellee has pointed out the general proposition that a trial court has discretion in awarding attorney fees, but it has failed to mention that attorney fees are statutorily mandatory in this case. It has cited Paul Mueller Co. v. Cache Valley Dairy Ass'n, 657 P.2d 1279 (Utah 1982), for the proposition that attorney fees "cannot be allowed unless there is evidence to support them." But, in Paul Mueller Company, the court did award attorney fees under the Mechanic's Lien Statute. The issue was how to apportion fees between multiple plaintiffs' respective counsel. There was no statement or suggestion that it would be appropriate to deny attorney fees altogether. The court's reference to Utah Farm Production Credit Association v. Cox, 627 P.2d 62 (1981), was simply to make the point that there must be evidence to distinguish the portion of fees spent in prosecuting the cause of action for which there is statutory entitlement to attorney fees. Paul Mueller Company, 657 P.2d at 1288. Moreover, the basis for attorney fees in Utah Farm Production Credit Association v. Cox was a contract. Neither Paul Mueller Company nor Utah Farm Production is authority for denying fees altogether

when the applicable statute requires an award. Appellant is entitled to reasonable attorney fees as the prevailing party in an action under the Mechanic's Lien Statute.

Attorney fees under the Bond Statute are also mandatory. There are several provisions addressing an award of attorney fees under the bond statute:

> In an action for failure to obtain a bond, the court may award reasonable attorneys' fees to the prevailing party. These fees shall be taxed as costs in the action.

Utah Code Ann. § 14-2-2(3)(1993). The foregoing provision specifically addresses the failure of a property owner to obtain a payment bond. A more general provision under the same chapter, however, mandates an award of fees to the prevailing party in all actions under the Bond Statute:

> In <u>any suit</u> upon a payment bond under this chapter, the court <u>shall</u> award reasonable attorneys' fees to the prevailing party.

Utah Code Ann. § 14-2-1(7) (emphasis added). The Bond Statute, thus, provides for mandatory attorney fees to a prevailing party in <u>any</u> action brought under the statute.

Appellee has argued that it was proper for the trial court to deny fees altogether because Appellants' counsel "made no attempt to distinguish its services rendered on the unjust enrichment claim from the other two causes of action." (Brief of Appellee at 25.) That statement is inaccurate. Appellants'

counsel submitted an affidavit of attorney's fees and costs itemizing the time spent on bringing its successful Motion for Partial Summary Judgment. (R. 111-114.) Appellee objected to an award of attorney fees because Appellants' counsel had not segregated the time with respect to causes of action. (R. 117.)

Appellant's counsel explained and defended his request for fees in Appellant's Response to Plaintiff's Objections to Proposed Judgment. (R. 122-24.) Appellants' counsel stated that the majority of his time spent on the Motion for Partial Summary Judgment was spent on the mechanic lien argument and the bond argument. Indeed, Appellant's 10-page Memorandum in Support of its Motion for Partial Summary Judgment contains only one page addressing the unjust enrichment cause of action. (R. 72-73.) The unjust enrichment argument is very simple and, unlike the mechanic's lien and bond arguments, it refers to no case law or statute. Research on the unjust enrichment case was confined to Black's Law Dictionary. (R. 72.) Appellant's Reply Memorandum in Support of its Motion for Partial Summary Judgment does not even mention the unjust enrichment claim. (R. 96-99.) There is ample evidence in the pleadings themselves to indicate that Appellant's counsel spent virtually no time on the unjust enrichment cause of action and Appellants' counsel explained as much to the trial court. To fail to make an award altogether in the face of such evidence was an abuse of discretion. The issue of attorney fees

should be remanded to the trial court for a determination of the appropriate fee.

D. THE AWARD OF PREJUDGMENT INTEREST SHOULD BE VACATED.

Under Utah law, prejudgment interest is available on liquidated amounts. It is generally unavailable in actions in equity because the amount of an award in equity is usually unliquidated until judgment is entered. Shoreline Development, Inc. v. Utah County, 835 P.2d 207 (Utah Ct. App. 1992).

Appellee has misstated the holding of Shoreline. That case does not "provide[] for an award of interest in unjust enrichment cases tried directly to the court." (Brief of Appellee at 27.) That issue was not before the court in Shoreline. The case was tried to a jury and, consequently, the Court of Appeals' decision focused on the risk of double recovery when the court cannot know whether the jury's award includes interest. Id. at 211. In all equity cases, however, the trier of fact must use its discretion to determine the proper amount of the award. Thus, damages are usually, if not always, unliquidated at the time the cause of action arises and thus not subject to prejudgment interest.

The Utah Supreme Court has stated that "where damages are incomplete or cannot be calculated with mathematical accuracy . . . the amount of the damage must be ascertained and assessed by the trier of fact at the trial, and in such cases prejudgment

interest is not allowed." Bjork v. April Industries, Inc., 560 P.2d 315, 317 (Utah 1977) (emphasis added). In the present case, the amount of damages was not liquidated until judgment was entered. The trial court based its award on the grounds that "approximately" 10 percent of the work had been completed based on the architect's testimony of "less than 10 percent," although the court noted that "counsel did not tie him down to a figure." (R. 803.) In fact, the trial court had already determined that the amount was not liquidated. (R. 299, Reporter's Transcript of Defendant's Motion for Partial Summary Judgment and Scheduling Conference at pp. 12-15; R. 128, Order of Partial Summary Judgment.)

Finally, Appellee is simply wrong in stating that this is not a case of equity. Unjust enrichment sounds in equity and, for the reasons stated by the Court in Shoreline and Bjork, prejudgment interest is inappropriate in the present case.

E. THE TRIAL COURT'S AWARD OF POST-JUDGMENT INTEREST SHOULD BE VACATED.

Post-judgment interest is appropriate from the time judgment is "rendered." Utah Rules of Civil Procedure, 54(e). Appellee argues that "rendered" means verbally rendered from the bench. It has cited no case from any jurisdiction to support this

contention. Most courts, including Utah, hold that a judgment is "rendered" when it is entered.[1]

Appellee has argued that because the trial court granted Appellee's motion to compel Appellants to prepare and file Findings, Conclusions and Judgment, post-judgment interest should run from the date that the Motion was granted. As explained in the Brief of Appellant, the delay in filing the proposed findings of fact was occasioned by Appellant's substitution of counsel. Appellee could have moved for sanctions, but did not.

Finally, Appellee has argued that because the amount of post-judgement interest at issue here is small, it would not be unfair to allow the trial court's ruling to stand. (Brief of Appellee at 31.) The amount of interest is immaterial. The law does not permit post-judgment interest to run prior to the date judgment is entered and there is no reason that the law should not be followed in this case. The trial court's award of post-judgment interest should be vacated.

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[1] See Mason v. Western Mortgage Loan Corp., 754 P.2d 984 (Utah Ct. App. 1985) (post-judgment interest runs from the date of entry of new judgment, not from date of previous erroneous judgment); National Steel Construction Co. v. National Union Fire Ins. Co. of Pittsburgh, 543 P.2d 642 (Wash. Ct. App. 1975) (error to impose interest from the date of court's oral decision rather than from the date judgment was entered); Pure Gas & Chemical Co. v. Cook, 526 P.2d 986, 993 (Wyo. 1974) (error to grant post-judgment interest from the date of the verdict, rather than date judgment was entered).

CONCLUSION

This case is not about fashioning a proper remedy. The major issue in this case is whether Appellee was entitled to any remedy at all. For the foregoing reasons, and for the reasons set forth in the Brief of Appellant, the award of damages was error and should be vacated.

Under both the Mechanics' Lien Statute and the Bond Statute, the prevailing party is entitled to attorney fees. There was sufficient evidence as to the amount of those fees and, while the trial court had discretion to determine the appropriate amount of attorney fees, it was an abuse of discretion to deny fees altogether.

Finally, the award of prejudgment and post-judgment interest should be vacated because an award of damages was not warranted in this case. Even assuming the award of damages was proper, prejudgment interest is not available because the amount of damages was not liquidated until the Court entered judgment. Post-judgment interest, if any, should run from the date judgment was entered and not before that date.

For the foregoing reasons and for the reasons stated in the Brief of Appellants, the award of damages and of prejudgment and post-judgment interest was contrary to law and should be vacated. The case should be remanded to the trial court with instructions to determine and award Appellants their reasonable

attorney fees incurred in bringing their Motion for Partial Summary Judgment on the Mechanic's Lien Statute and the Bond Statute.

DATED this 30th day of August, 1993.

SPENCER E. AUSTIN
WILLIAM J. EVANS
of and ~~for~~
PARSONS BEHLE & LATIMER

AFFIDAVIT OF SERVICE

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

WILLIAM J. EVANS, being duly sworn says that he is employed in the law offices of PARSONS BEHLE & LATIMER, attorneys for Appellants, that he has this day caused to be served by hand delivery two copies of the foregoing REPLY BRIEF OF APPELLANTS and a copy of this Affidavit of Service to the following at the address shown below:

Bruce J. Nelson
Allen Nelson Rasmussen & Christensen
215 S. State Street, Suite 900
Salt Lake City, UT 84111

Dated at Salt Lake City, Utah this 30th day of August, 1993.

William J. Evans

Subscribed and sworn to before me this 30th day of August, 1993.

Sheila P. Land
NOTARY PUBLIC
Residing at: 210 S. Main #1800

My Commission Expires:
Aug. 3, 1997

NOTARY PUBLIC
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Salt Lake City, Utah 84147
My Commission Expires
August 3, 1997
STATE OF UTAH

69654

V. ADDENDUM

A. Findings of Fact and Conclusions of Law

B. Judgment

C. Construction Contract

D. Determinative Rules and Statutes

1. Utah Rule of Civil Procedure 54(e) (1992)
2. Utah Rule of Appellate Procedure 32 (1992)
3. Utah Code Ann. § 14-2-1(7) (1992)
4. Utah Code Ann. § 14-2-2 (1992)
5. Utah Code Ann. § 38-1-18 (1992)

ADDENDUM A

ADDENDUM A

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IN THE THIRD JUDICIAL DISTRICT COURT

OF AND FOR SUMMIT COUNTY, STATE OF UTAH

* * * * * * * *

BAILEY-ALLEN COMPANY, INC., Plaintiff, vs. STANLEY M. KURZET, an individual; STANLEY M. KURZET and ANNE L. KURZET, as Trustees for THE KURZET FAMILY TRUST; THE KURZET FAMILY TRUST; and John Does 1 through 10, Defendants.	FINDINGS OF FACT AND CONCLUSIONS OF LAW Civil No. 10870

* * * * * * * *

This action, having been tried to the Court, and the Court, having considered the evidence and the arguments of counsel, and good cause appearing therefor, hereby makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. The Court finds that the parties intended to and did enter into a written contract wherein plaintiff agreed to act

as the general contractor and to oversee the construction of defendants' residence in Park City, Utah.

2. The Court finds that the contract between the parties provided that plaintiff would complete construction on defendants' residence within one year and, in return, defendant would pay plaintiff $100,000 consideration for plaintiff's services in directing and supervising the construction, and $22.00 per hour for plaintiff's own hands-on labor.

3. The Court finds that plaintiff was aware that defendants had experienced problems with prior general contractors and had terminated two general contractors for unsatisfactory performance. Plaintiff was also aware that Mr. Kurzet was a meticulous and demanding individual and would require exacting performance of the contract.

4. The Court finds the parties intended and the contract provided for plaintiff, within 10 days after entering into the contract, to provide defendants with evidence of adequate liability insurance covering its work pursuant to the contract.

5. The Court finds that plaintiff represented to defendants that plaintiff had $1 million in liability insurance coverage in force at the time the parties entered into the contract on July 3, 1990, that defendants wanted $4-5 million in coverage, and that plaintiff later discovered its policy was only

for $300,000 coverage and that it had been cancelled on October 24, 1989.

6. The Court finds that, in a memorandum of July 20, 1990 from defendants to plaintiff, which was delivered to Michael Kent, defendants notified plaintiff that plaintiff had not yet provided the necessary certificate evidencing insurance coverage and that defendants required such evidence under the terms of the contract.

7. The court find that defendants terminated plaintiff's services on October 2, 1990.

8. The Court finds, that about 10% of the construction project was completed while plaintiff was general contractor and, based on that percentage, defendants received a benefit from plaintiff's pre-termination services in the amount of $10,000 regardless of whether plaintiff performed its duties under the contract.

9. The Court finds that defendants realized a benefit of $5,500 which represents the amount saved by defendants through plaintiff's services involving negotiations for the purchase of lumber.

CONCLUSIONS OF LAW

1. The Court concludes that the subject contract was ambiguous and incomplete as drafted and that the Court has a responsibility to add to it and to look upon it as an oral contract between the parties.

2. The Court concludes that the contract can be interpreted as written.

3. The Court concludes that given the amount of the subject contract and the cost of the construction, plaintiff had a duty to inquire into the adequacy of its insurance coverage for the project, but did not.

4. The Court concludes that plaintiff's failure to promptly provide evidence of adequate liability insurance was a material breach of the contract.

5. The Court concludes that defendants were justified in terminating plaintiff's services for plaintiff's breach of its obligation to promptly provide evidence of adequate liability insurance.

6. The Court concludes that defendants were justified in terminating plaintiff's services because plaintiff spent very few hours on the job site and did not give the construction project the attention that it required under the contract and that plaintiff knew Mr. Kurzet would expect.

7. The Court concludes that defendants are not in breach of the contract in any way.

8. With respect to plaintiff's Unjust Enrichment Claim, the Court has considered several alternative methods of calculating any award to plaintiff under such a theory. The Court concludes the most logical basis to be the percentage of defendants' residence that was completed during the period plaintiff was on the job.

9. The Court rejects plaintiff's proposal that it should receive 1/4 or $25,000, of the $100,000 consideration contemplated under the contract because it spent three months on the job, or one quarter, of the one-year period for constructing the residence as contemplated under the contract. The Court finds that such a proposal is unreasonable and unsupported by the facts.

10. The Court concludes that plaintiff is entitled to receive $15,500 from defendant in quantum meruit/unjust enrichment, based on the contract between plaintiff and defendants, $10,000 representing 1/10 of the contract price of $100,000 for services in completing 1/10 of the construction, and $5,500 for services involving negotiations for the purchase of lumber.

11. The Court concludes that plaintiff is liable to defendant for the sum of $1,800 which represents defendants'

costs in repairing plaintiff's faulty construction of defendants' east side retaining wall.

12. The Court concludes that plaintiff is liable to defendants in the amount of $2,000 which represents defendants' costs in repairing plaintiff's faulty construction of defendants' west side concrete steps.

13. The Court concludes that plaintiff is liable to defendants in the amount of $559, which represents defendants' costs for plaintiff's ordering three unnecessary Glu-Lam beams.

14. The Court concludes plaintiff is entitled to pre-judgment interest at the rate of ten percent (10%) per annum, from November 1, 1990, the date defendants terminated plaintiff's services, to April 17, 1992, the date this Court granted plaintiffs' Motion to Compel Filing of Findings of Fact, and post-judgment interest at the rate of twelve percent (12%) per annum from and after April 17, 1992.

DATED this 6 day of Oct., 1992.

BY THE COURT:

HOMER WILKINSON
District Court Judge

THIRD JUDICIAL DISTRICT COURT
OF UTAH

APPROVED AS TO FORM:

BRUCE J. NELSON
Attorney for Plaintiff

WJE/052092A

ADDENDUM B

ADDENDUM B

SPENCER E. AUSTIN (0150)
WILLIAM J. EVANS (5276)
of and for
PARSONS BEHLE & LATIMER
Attorneys for Defendants
201 South Main Street, Suite 1800
P.O. Box 11898
Salt Lake City, Utah 84147-0898
Telephone: (801) 532-1234

IN THE THIRD JUDICIAL DISTRICT COURT

OF AND FOR SUMMIT COUNTY, STATE OF UTAH

* * * * * * * *

BAILEY-ALLEN COMPANY, INC., Plaintiff, vs. STANLEY M. KURZET, an individual; STANLEY M. KURZET and ANNE L. KURZET, as Trustees for THE KURZET FAMILY TRUST; THE KURZET FAMILY TRUST; and John Does 1 through 10, Defendants.	)	JUDGMENT
	)	Civil No. 10870

* * * * * * * *

This action came on for trial before the Court, the Honorable Homer Wilkinson, District Judge, presiding, and the issues, having been duly tried to the Court, and the Court having entered its Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That plaintiff recover from defendants in quantum meruit/unjust enrichment, based on the contract between plaintiff

and defendants, the amount of $11,141.00, with interest thereon at the legal rate provided by law in accordance with paragraph 4 below, which represents $10,000 for services rendered in directing and supervising 1/10th of the construction of defendants' residence, and $5,500 for plaintiff's services involving negotiations for the purchase of lumber, adjusted by applying as an offset the following awards to defendants:

a. The sum of $1,800 which represents defendants' costs in repairing plaintiff's faulty construction of defendants' east side retaining wall;

b. The sum of $2,000 which represents defendants' costs in repairing plaintiff's faulty construction of defendants' west side concrete steps; and

c. The sum of $559 which represents defendants' costs caused by plaintiff's ordering three unnecessary materials;

2. That defendants are not entitled to attorneys' fees and costs attributable to defendants' Motion for Partial Summary Judgment;

3. That plaintiff is awarded $542.40 as its costs of court itemized as follows :

a. Filing fee, $75,00;

b. Service of process fees, $32.25;

c. Kurzet deposition; $311.15;

d. Bailey/Kent depositions, $99.00; and

e. Expert witness fee, $25.00.

4. That plaintiff is entitled to pre-judgment interest on $11,141.00 at the rate of ten percent (10%) per annum for the period from November 1, 1990 to April 17, 1992, and post-judgment interest at the rate of twelve percent (12%) per annum from and after April 17, 1992; and

5. That defendant's counterclaims are hereby dismissed with prejudice.

DATED this 6 day of Oct., 1992.

BY THE COURT:

HOMER WILKINSON
District Court Judge

SUMMIT COUNTY
OF UTAH

APPROVED AS TO FORM:

BRUCE J. NELSON
Attorney for Plaintiff

WJE/052292B

ADDENDUM C

ADDENDUM C

A G R E E M E N T

This Agreement covers all of the understandings existing between BAILEY-ALLEN (Contractor) and STANLEY KURZET (Owner) for the construction of a residence on LOT #4 of the EVERGREEN development at DEER VALLEY, PARK CITY, UTAH.

The Contractor is retained by Owner on a cost plus fixed fee basis. Costs shall be billed monthly and payment shall be made within ten days of receipt of billing. The fee fixed for this contract is set at $100,000 for the residence as depicted in the drawings plus a maximum of $50,000 in directed additional work, if any. Any directed additional work in excess of an aggregate cost of $50,000 will result in additional fees based on 7% of the cost of such additional work.

All billing incorporating costs involving subcontractors or suppliers will be supported by copies of invoices clearly showing that the services were performed and/or materials delivered at the job site and shall further carry the notation by Contractor that the billing is true and correct.

In the event that Owner's absence from Park City would result in failing to pay Contractor in a timely manner as set forth above, Contractor may Fax the billing to Owner and Owner shall cause payment to by made by express mail or electronic transfer directly to Contractor's account, however, when such payment is made, Owner reserves the right to review and obtain adjustment if indicated pending the opportunity to review the records and work performed upon Owner's return.

Both Contractor and Owner stipulate that this contract cannot be changed except and unless in writing, bearing the date and signatures of both parties.

The residence shall be constructed in accordance with the drawings and no change will be made without the express written consent of Owner. All changes will be covered by a written Change Order in the form of EXHIBIT A attached hereto, describing the nature of the change, the resulting differential in costs and the impact on completion schedule if any and be dated and approved by both Owner and Contractor.

The work is to be performed in accordance with a schedule prepared by Contractor and the structure completed by April 15, 1991 and a Temporary Certificate of Occupancy shall have been obtained by that date. The only Item permissible to be outstanding on the TCO is landscaping. A schedule in the general form of Exhibit B, prepared by Contractor shall be the definitive document for assessing whether work is or is not progressing on schedule.

The residence was designed through the cooperative effort of

Mark Walker, the Architect and Owner. Any questions pertaining to the structure should be directed to Mark Walker or his associate, Stan Johnson. If the architect fails to respond and such continued failure will cause increased construction costs, Owner is to be notified at the earliest possible moment so that he has the opportunity to mitigate such costs. The Owner shall not be liable for increased costs occasioned by such delays in response or recovery from drawing or design errors where the Contractor failed to notify Owner before the increased costs were so incurred.

The Owner will have review authority and right of refusal on subcontracts and material purchases. The Contractor will obtain competitive bids for services and materials in sufficient time to permit a review of a maximum of one week duration by Owner and if necessary, select an alternative supplier without impact on schedule or cost. Every effort will be made by the Contractor to locate, solicit and select suppliers sufficiently in advance of need to prevent the forced acceptance of an uneconomic bid because a delay would be as costly or more costly than the loss arising from the uneconomic bid. All bids will provide sufficient detail to permit an intelligent analysis of the value of such bid. Time and material bids will at minimum state the proposed hourly rates for each category of labor and the percentage of fees and all other costs to be passed on to Owner for labor and material. Both fixed price and T&M bids will adequately identify the materials to be provided as to quantity, type, grade, model and manufacturer as applicable.

The Owner's review authority notwithstanding, the Contractor is fully responsible to Owner for the performance of subcontractors. Accordingly, costs occasioned by the failure of a subcontractor to perform shall not be assessable to Owner.

The Contractor shall carry insurance specifically providing for saving Owner harmless from any action arising due to the injury of a worker even if an employ of a subcontractor or supplier who is not properly or adequately insured. Contractor shall, within 10 days of the date of this agreement furnish a Certificate of Insurance prepared by the Carrier or its Authorized Agent. The Certificate shall specifically state the purpose and limits of the policy and these shall show that the work to be performed under this contract is covered.

Owner specifically states and Contractor acknowledges that Owner and only Owner is empowered to direct the Contractor to incur cost unforeseen by the plans and specifications that are in excess of an aggregate of $1,000 (one thousand Dollars) for any given category. A category is defined as a class of event such as work performed in accordance with a plan error that must be corrected, or need to perform additional work as a result of inclement weather, or rework directed by the City Inspector and similarly reasonably unforseeable events. Accordingly, any costs arising from the performance of a directive from any person whomsoever

other than Owner which are in excess of the $1,000 aggregate per category limit, will not be reimbursable under this agreement. Therefore, in order for cost arising from any ordered changes or rework to be reimbursable to Contractor, such work must be described and authorized in writing. However, the Owner will not unreasonably withhold approval for any proposed additional work which may in the opinion of Architect, Contractor, Inspector, Engineer, members of Owner's family or others be deemed necessary or desirable.

The Contractor warrants that the residence will be free of of defects in workmanship and materials and shall, at no expense to Owner, correct any such defect for a period of one year from the date of the Temporary Certificate of Occupancy. The Contractor's liability in this regard specifically extends to consequential damage as may occur as a direct result of such deficiency in workmanship, and material. The Contractor's warranty liability does not extend to work performed or materials provided by Owner or to any consequence arrising therefrom.

Contractor takes note that Owner is concerned about the quality of workmanship and materials and that this concern stems from prior experience with a local contractor and ownership of several condominiums at the Pinnacle development. Owner will not make unreasonable demands, however, slovenly workmanship and/or substandard materials will neither be accepted or paid for by Owner. Owner considers that the fees he pays to Contractor are specifically for his expertise in selecting and supervising workers so as to avoid unacceptable and substandard workmanship and/or the use of substandard quality materials.

Both Owner and Contractor stipulate that time is of the essence and both will make every effort to reach the other as expeditiously as possible. The Owner and Contractor can be contacted as set forth in Exhibit C.

In the event Owner will not be at either of these locations, Owner will leave or fax a schedule indicating where he can be reached on any given day.

In the event Contractor is not available, he shall leave word as to who is authorized to act for Contractor.

Entered into this Third Day Of July, 1990 at Park City, Utah.

CONTRACTOR

OWNER

EXHIBIT A

C H A N G E O R D E R

In connection with the construction of the Kurzet residence on Lot #4 Evergreen, Mountainland Builders is hereby authorized to perform the following specific work and to supply the materials and services as needed for such performance.

WORK DESCRIPTION

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

UNDERSTANDINGS

The cost differential of the above described work shall be:_____

_____

The affect on schedule of the described work shall be:_____

_____

APPROVALS

_____ _____

CONTRACTOR DATE OWNER DATE

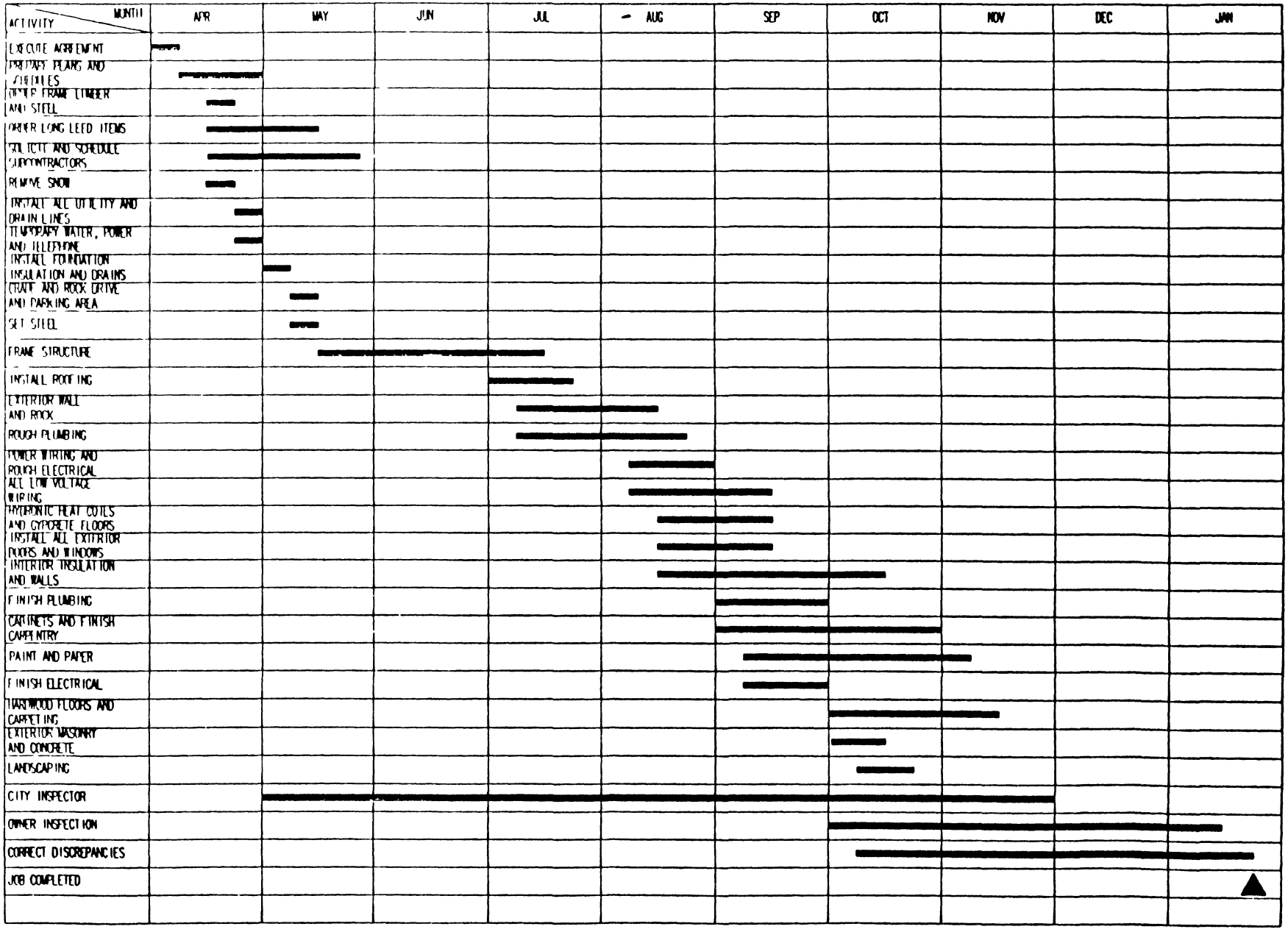

EXHIBIT B- -PAGE 5- -PROJECT PLANNING DOCUMENT, (PPD)

EXHIBIT C

TO CONTACT CONTRACTOR

Office:	P.O. Box 11074 Salt Lake City, UT 84147
Richard Allen	Tel. 801-973-7888
Michael Kent	801-466-4169
Park City Mobil	645-8450..1118
Salt Lake Mobil	534-0429..1328 1328
Work Site	TBD
Jeremy Ranch	645-8449

TO CONTACT OWNER

Park City:	Tel. 645-9269 Fax 645-8622 Mobile 801-573-4453
	PO Box 680670 1250 Pinnacle Drive Park City, UT 68048
Oregon Ranch:	Tel. 503-888-9269 Fax 503-888-6055
	PO Box 5039 Charleston Station Charleston, OR 97420
Tahiti	Box Postal 21164 Papeete French Polynesia
Direct dial from USA	011-689-532-235
Aircraft:	Direct Dial 402-931-1124
Mobile:	801-573-4453

ADDENDUM D

ADDENDUM D.1

Utah Rule of Civil Procedure 54(e) (1992)

(e) **Interest and costs to be included in the judgment.** The clerk must include in any judgment signed by him any interest on the verdict or decision from the time it was rendered, and the costs, if the same have been taxed or ascertained. The clerk must, within two days after the costs have been taxed or ascertained, in any case where not included in the judgment, insert the amount thereof in a blank left in the judgment for that purpose, and make a similar notation thereof in the register of actions and in the judgment docket. (Amended effective January 1, 1985.)

ADDENDUM D.2

Utah Rule of Appellate Procedure 32 (1992)

Rule 32. Interest on judgment.

Unless otherwise provided by law, if a judgment for money in a civil case is affirmed, whatever interest is allowed by law shall be payable from the date the judgment was entered in the trial court.

ADDENDUM D.3

Utah Code Ann. § 14-2-1(7)

(7) In any suit upon a payment bond under this chapter, the court shall award reasonable attorneys' fees to the prevailing party. 1989

ADDENDUM D.4

Utah Code Ann. § 14-2-2 (1992)

14-2-2. Failure of owner to obtain payment bond — Liability.

(1) Any owner who fails to obtain a payment bond is liable to each person who performed labor or service or supplied equipment or materials under the contract for the reasonable value of the labor or service performed or the equipment or materials furnished up to but not exceeding the contract price.

(2) No action to recover on this liability may be commenced after the expiration of one year after the day on which the last of the labor or service was performed or the equipment or material was supplied by the person.

(3) In an action for failure to obtain a bond, the court may award reasonable attorneys' fees to the prevailing party. These fees shall be taxed as costs in the action. 1969

ADDENDUM D.5

Utah Code Ann. § 38-1-18 (1992)

38-1-18. Attorneys' fees.

In any action brought to enforce any lien under this chapter the successful party shall be entitled to recover a reasonable attorneys' fee, to be fixed by the court, which shall be taxed as costs in the action. 1961